

### Remarks

In view of the previous amendments and the following remarks, reconsideration and further examination are respectfully requested. Again, if any fees are due, the Commissioner is authorized to charge any extensions of time as well as any other fees to Deposit Account No. 23-3030, but not to include any payment of issue fees.

On April 4, 2005, a Response to the January 4, 2005 Office Action was filed. On June 20, 2005, a Notice of a Non-Responsive Amendment was mailed giving a deadline the longer of one (1) month or thirty (30) days from the mailing notice to reply. The following remarks have been made to address the issues raised in the Notice. So as to avoid any confusion, since the Notice only objected to parts addressed in the remarks section, only the remarks section has been supplied to supplement the previous remarks from the April 4, 2005 response. For the Examiner's convenience, the previously submitted remarks section has been identified below. It is believed that supplying only the remarks section is consistent with current Patent Office practice of supplying only the sections the need to be corrected. Therefore, the following remarks should be considered in view of the Amendments to the Claims section from the April 4, 2004 Response.

### *New Remarks*

On page 2 of the Notice, it was stated the "[t]he amendment failed to specifically point out support for new claims 43-64 including claim language "dumbbell", claim limitation such as claim 54 wherein both end pieces are threaded, and methods such as claim 61, etc." In response to this objection, but without conceding its propriety, the following remarks have been made in order to speed prosecution. The remarks are grouped by independent claim.

It is believed that independent claim 43 is supported by the application as originally filed. Independent claim 43 recites the features recited in claim 12 as originally filed in the application on August 2, 2003. Claim 43 is also supported by FIGS. 4-6 and the corresponding description starting on page 13, line 3, as well as at other locations throughout the specification.

It is likewise submitted that independent claim 44 and its dependent claims are supported by the application as originally filed. Regarding the term "dumbbell", it was used so that the reader would easily recognize the shape of the fusion devices being claimed. It is generally understood that a dumbbell includes a bar that has disk at each end. After reading the originally

Response to Office Action 06-20-05  
Serial No. 10/634,711  
Group Art Unit 3738  
Attorney Docket No. 4002-3365  
CPS:lc351354

Page 2 of 6

filed application, one of ordinary skill in the art would easily recognize the shape of a dumbbell as well as appreciate how this term corresponds to the shape of implants shown in the drawings. For example, FIG. 37 in the originally filed application (as well elsewhere in the application) shows an osteogenic fusion device (110) that has such an overall dumbbell shape in which a central element (113) has first (111) and second (112) end pieces at each end. Thus, it is submitted that claims 44-47 are supported by the description of the FIG. 37 embodiment on pages 19 and 20, as well as elsewhere in the application. Dependent claim 48 is believed supported by FIG. 38 and its accompanying description starting on page 20, line 5. Dependent claim 49 is for example supported by FIG. 39 and its accompanying description starting on page 20, line 14. Claims 50-52 are supported by FIGS. 40-44 and the accompanying description starting on page 20, line 25. Dependent claim 53 is for example supported by FIGS. 30-32 and the description from page 18, line 16 to page 19, line 4 of the application. The "threaded" feature of claim 54 is supported by the description of the FIGS. 40-42 embodiment at page 21, lines 12-15, and elsewhere, such as at page 22, lines 14-15. Dependent claim 55 is for instance supported by page 22, lines 12-14, and page 23, lines 15-18 of the application. Dependent claim 56 is supported by page 5, lines 23-28, and claim 31 of the original filed application, as well elsewhere throughout the application.

Furthermore, it is submitted that independent claim 57 and dependent claims 58-60 are supported by the application as originally filed. For example, it is believed that FIG. 37 and the accompanying description on pages 19 and 20 support claims 57-60.

Regarding method claim 61 and dependent claims 62-65, it is believed that these claims are supported by the originally filed application as well. It is again believed that the term "dumbbell" is supported by the originally filed application for at least the reasons discussed above. In addition, claims 61 and 63 are supported at page 18, lines 5-15; page 22, lines 3-17; and page 23, lines 11-18 of the application. Dependent claim 62 is supported by FIG. 37 and its accompanying description as well as elsewhere in the application. Dependent claim 64 is for example supported by FIG. 39 and its accompanying description starting on page 20, line 14. The male and female members recited in claim 65 are clearly supported by FIGS. 40-44 and the accompanying description starting on page 20, line 25.

***Previous Remarks***

Claims 16-29 and 31 have been canceled without prejudice. Claims 1, 30 and 32 have been amended, and claims 43-65 have been added. As a result, claims 1-15, 30, and 32-65 are currently pending. It is believed that claims 1, 2, 9-13, 15, 30, 32, 33, 36-38, 42-47, and 55-63 read on the elected species. Claims 3-8, 14, 15, 34, 35, 39-41, 48-54, 64 and 65 have been withdrawn from consideration. Consequently, claims 1, 2, 9-13, 15, 30, 32, 33, 36-38, 42-47, and 55-63 are currently pending and under consideration.

Initially, the applicants wish to thank the Examiner for indicating that previous dependent claim 12 contained allowable subject matter on page 12 of the Office Action. In that regard, the features of dependent claim 12 have been rewritten into independent form as claim new independent claim 43. Consequently, it is believed that independent claim 43 is in condition for allowance.

On pages 4 and 6 of the Office Action, independent claim 1 was "rejected under 35 U.S.C. 102(b,e) as being anticipated by Grosse et al (WO 97/23174)." It is believed that independent claim 1, as currently amended, is not anticipated by Grosse et al. For example, Grosse et al. fails to disclose or suggest "wherein at least one of said opposite end pieces of said second load bearing member contacts said truncated surface of said first load bearing member to nest the first and second load bearing members together" as is recited in claim 1. As can be seen in FIGS. 4 and 5, the implants 1 in Grosse et al. do not contact one another, but rather, are spaced apart from one another. Thus, Grosse et al. fails to disclose an end piece of one load bearing member contacting a truncated surface of another load bearing member to nest the two members together. For this and other reasons, it is believed that independent claim 1 and its dependent claims are allowable over the references of record.

On pages 4 and 6 of the Office Action, independent claim 30 was "rejected under 35 U.S.C. 102(b,e) as being anticipated by Grosse et al (WO 97/23174)." It is believed that independent claim 30, as currently amended, is not anticipated by Grosse et al. For example, Grosse et al. fails to disclose or suggest "placing said implant system into the intervertebral space after said preparing step, wherein said placing includes engaging one of the opposite end pieces of said second load bearing member with said truncated surface of said second load bearing

member to nest said first load bearing member with said second load bearing member.” It should be readily recognized from FIGS. 4 and 5 that the implants 1 in Grosse et al. are not nested in a manner in which an end piece of one of the implants 1 engages a truncated surface of the other implant 1. Rather, the implants 1 in Grosse et al. are spaced apart from one another. For this and other reasons, it is believed that independent claim 30 is allowable over the references of record.

On pages 4 and 6 of the Office Action, independent claim 32 was “rejected under 35 U.S.C. 102(b,e) as being anticipated by Grosse et al (WO 97/23174).” It is believed that independent claim 30, as currently amended, is not anticipated by Grosse et al. For example, Grosse et al. fails to disclose or suggest “said first end piece of said second fusion device being received in said cutout region of said first end piece of said first fusion device to nest said first fusion device with said second fusion device” as recited in claim 32. Looking at FIG. 4 of Grosse et al., the implants 1 are spaced apart from one another, and do not have nested components that are received in one another. For this and other reasons, it is believed that independent claim 32 and its dependent claims are allowable over the references of record.

New independent claim 44 has been added provide additional coverage, and it is believed that claim 44 is allowable over the references of record. For instance, the references of record, like Grosse et al., fail to disclose or suggest “at least one of the opposing end pieces of the first fusion device defines a cutout region that is concave in shape and at least one of the opposing end pieces of the second fusion device is received in the cutout region to nest the second fusion device with the first fusion device” as recited in claim 44. As can be seen in FIG. 4, the implant in Grosse et al. does not have a cutout region with a concave shape. Further, no portions of the implants 1 in Grosse et al. are received in the other one to nest the implants 1 together. For this and other reasons, it is believed that independent claim 44 and its dependent claims are allowable over the references of record.

New independent claim 57 has been added provide additional coverage, and it is believed that claim 57 is allowable over the references of record. For instance, the references of record, like Grosse et al., fail to disclose or suggest “the first end piece of the first load bearing member has a truncated surface, and the first end piece of the second load bearing member contacts the truncated surface of the first load bearing member” as recited in claim 57. It should be recognized that the implants in Grosse et al. do not contact one another in the manner as recited,

Response to Office Action 06-20-05  
Serial No. 10/634,711  
Group Art Unit 3738  
Attorney Docket No. 4002-3365  
CPSJe.351354

Page 5 of 6

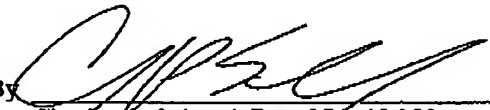
and further, in FIG. 4, do not even contact one another. For this and other reasons, it should be appreciated that independent claim 57 and its dependent claims are allowable over the references of record.

New independent claim 61 has been added provide additional coverage, and it is believed that claim 61 is allowable over the references of record. For instance, the references of record, like Grosse et al., fail to disclose or suggest "nesting the second fusion device with the first fusion device within the surgical window by positioning at least a portion of one the end pieces of the second fusion device in the cutout region of the first fusion device" as recited in claim 61. From FIGS. 4 and 5, it should be appreciated that the implants 1 in Grosse et al. are not nested in the manner as recited in claim 61 because no portion of either implant 1 is received in the other. For this and other reasons, it should be appreciated that independent claim 61 and its dependent claims are allowable over the references of record.

As a housekeeping matter, it should be noted that an Information Disclosure Statement (IDS) has been submitted with this (April 4, 2005) response in order to cite the references mentioned on page 2 of the Office Action. Copies of the cited references have also been enclosed. The Applicants kindly request that the Examiner return an initialed copy of the IDS form with the next communication from the Patent Office.

In view of the above amendments and remarks, it is submitted that the present application is now in condition for allowance, and the Examiner is requested to pass the case to issue. If the Examiner should have any comments or suggestions to help speed the prosecution of this application, the Examiner is requested to contact the Applicants' undersigned representative by telephone.

Respectfully submitted,

By   
Charles P. Schmal, Reg. No. 45,082  
Woodard, Embardt, Moriarty, McNett & Henry LLP  
Bank One Center/Tower  
111 Monument Circle, Suite 3700  
Indianapolis, Indiana 46204-5137  
(317) 634-3456